IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82 5935

RONALD JACKSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A STATE APPELLATE COURT, BY HOLDIING THAT THE SENTENCING COURT'S CONSIDERATION OF AN IMPROPER NON-STATUTORY AGGRAVATING FACTOR COULD NOT HAVE AFFECTED THE OVERALL SENTENCING WEIGHING PROCESS DESPITE THE FINDING OF SUBSTANTIAL MITIGATING FACTORS, VIOLATES THE EIGHTH AMENDMENT REQUIREMENT OF RATIONAL APPELLATE REVIEW OF CAPITAL SENTENCING DECISIONS.

II

WHETHER A STATE APPELLATE COURT, BY UPHOLDING DEATH SENTENCING FINDINGS OF A SENTENCING COURT DESPITE EVIDENCE THAT THE COURT FAILED TO CONSIDER AS A MATTER OF LAW RELEVANT EVIDENCE IN MITIGATION, VIOLATES THE RELIABILITY AND INDIVIDUALIZATION REQUISITES OF THE EIGHTH AMENDMENT.

III

WHETHER A JURY INSTRUCTION WHICH PRESUMES DEATH TO BE THE PROPER SENTENCE UPON THE FINDING OF AN AGGRAVATING FACTOR, AND THEN PLACES THE BURDEN OF PROOF UPON THE CAPITAL DEFENDANT TO ESTABLISH OVERRIDING MITIGATING FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

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THE STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Ronald Jackson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on December 13, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida is not yet reported. The full opinion is Appendix A to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), to review the judgment and opinion of the Supreme Court of Florida, issued on October 7, 1982 and rendered upon the denial of a timely motion for rehearing on December 13, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMEND. VIII, U. S. CONST.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND. XIV, § 1, U. S. CONST.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 921.141, Fla. Stat. (1973)

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections [5] and [6] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

* * *

(5) AGGRAVATING CIRCUMSTANCES. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder in the Circuit Court of the Eleventh Judicial Circuit of Florida on December 18, 1974, and was sentenced to death on December 23, 1974. A timely appeal was taken to the Supreme Court of Florida, which affirmed the judgment and sentence on October 26, 1978. Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

A petition for writ of habeas corpus was filed in the Supreme Court of Florida on February 17, 1981, alleging that petitioner nad been denied effective assistance of counsel on direct appeal due to the failure of his attorney to raise meritorious legal issues in contravention of the Sixth, Eighth and Fourteenth Amendments. Appendix D. After litigation of the merits of the previously-omitted substantive claims, the petition was denied on October 7, 1982, and a timely motion for rehearing was denied on December 13, 1982. Appendix A, E, F, G.

As reflected in the original decision of the Supreme Court of Florida, Appendix C, the charges against the petitioner arose from a robbery perpetrated by petitioner and one Willie Watts on July 31, 1974, during the course of which the victims were driven to a secluded area; both suffered gunshot wounds when one victim escaped, and the other was driven to another location, where she was hidden beneath the brush and died as the result of

strangulation. 366 So.2d at 754-55. The evidence adduced at trial failed to establish whether petitioner or Watts perpetrated the homicide.[1]

At the capital sentencing hearing, extensive expert testimony was elicited regarding the impaired mental and emotional state of petitioner at the time of the offense. Appendix B at 2608-11, 2615-16, 2647-54. Specifically, it was established that petitioner, who was 18 years of age at the time of the offense, is a borderline mental retardate of "scarcely understanding ability", that he suffers from left hemispheric brain damage possibly resulting from inhalation of glue or transmission fluid, that his sister had been murdered on the night before the offense, and that this loss reduced him to an invalid who was "incapable of judging", that petitioner was in a "disturbed state" at the time of the offense and "didn't know what he was doing", and that petitioner would therefore not have been able to appreciate the nature of his conduct and to conform to the law. Appendix B at 2608-10, 2623-24, 2626, 2628, 2650, 2652, 2653-55. No expert testimony was introduced by the state to contradict this evidence.

At the request of the prosecutor, and over objection of counsel for petitioner, Appendix B at 2554-55, the trial court instructed the jury as follows regarding the burden of proof at the sentencing hearing:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Appendix B at 2698.

In imposing the death sentence upon petitioner, the trial court applied two statutory aggravating circumstances, Jackson v. State, supra at 756, and the following non-statutory circumstance:

> This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed any sign of

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1 Watts pled guilty to murder in the first degree and was sentenced to life imprisonment. 366 So.2d at 757.

> remorse, indicating full well to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case.

Id. at 756-57.

The court found two mitigating circumstances, the youthful age of petitioner and his lack of a prior criminal record, 366 So.2d at 757, but refused to weigh the evidence of his brain damage and diminished mental capacity:

> There was no contention or urging that the defendant was criminally insane but merely that he was unable to conform to the requirements of the law. This Court fails to recognize a voluntary induced condition caused by drug, glue or transmission sniffing as an excuse for the supreme punishment in this heinous case.

Ibid.

In the habeas corpus proceeding before the Supreme Court of Florida, petitioner asserted that his counsel had failed to challenge, inter alia, the reliance by the trial court upon a non-statutory aggravating circumstance, the limiting construction by the court of mitigating circumstances relevant to the impaired mental state of petitioner, and the burden of proof instruction in denigration of the Sixth, Eighth and Fourteenth Amendments. Appendix D at 7-12; Appendix E at 4-11. The Supreme Court rejected these claims, holding that the consideration of the non-statutory aggravating circumstance was erroneous but harmless because "the result of the weighing process would not have been different had the impermissible factor not been present", that the court had properly weighed the mitigating evidence and "resolved the factual conflicts in favor of the state" and that the burden of proof instruction was proper. Appendix A at 4-5.

A timely motion for rehearing, Appendix F, was denied by the court on December 13, 1982. Appendix G.

REASONS FOR GRANTING THE WRIT

I

THE SPECULATION IN WHICH THE SUPREME COURT OF FLORIDA ENGAGED IN UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-STATUTORY AGGRAVATING FACTOR IS DIRECTLY CONTRARY TO DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS AND RAISES SERIOUS AND CONTINUING CONSTITUTIONAL QUESTIONS REGARDING THE PROPER SCOPE OF STATE APPELLATE REVIEW IN CAPITAL CASES.

The central theme of this Court's capital sentencing decisions has been the minimization of the risk of arbitrariness in the death sentencing determination. See, e.g., Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). In approving Florida's death penalty scheme, this Court emphasized that the state supreme court, by virtue of its statewide jurisdiction and its commitment to proportionality review of every death sentence, could effectively avert any real risk of arbitrariness. Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). The role of the state supreme court was acclaimed as ensuring "consistency, fairness and rationality in the evenhanded operation of the State law." Ibid.

The Supreme Court of Florida, in its review of petitioner's death sentence, has departed from this essential role. The court has upheld petitioner's death sentence despite the sentencing court's consideration of a non-statutory aggravating factor and despite the Florida statute and precedent specifying that the aggravating factors must be limited to those delineated in the statute. Section 921.141(5), Florida Statutes (1973); Elledge v. State, 346 So.2d 998 (Fla. 1977). The Supreme Court of Florida did recognize that the sentencing court's reliance upon a non-statutory aggravating factor was error. Appendix A at 4. However, the court further held that, despite the finding of two mitigating circumstances, consideration of the erroneous aggravating factor was harmless:

> Although an improper aggravating circumstance (lack of remorse) was included in the findings of the trial judge's sentence

> decision and there were identified two mitigating circumstances (defendant's age and first conviction), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977), would not compel reversal of the sentence judgment in this case. It is apparent on the face of the findings by the trial judge that the result of the weighing process would not have been different had the impermissible factor not been present. Jackson, 366 So.2d at 756. It is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance.

Appendix A at 4.

Such speculation on the part of an appellate court calls into question the entire state system of control on arbitrariness which appellate scrutiny is said to foster. See Zant v. Stephens, cert. granted, ____U.S.____, 102 S.Ct. 90 (1981), certified to Georgia Supreme Court, ____U.S.____, 102 S.Ct. 1856 (1982). Moreover, the conjecture in which the Supreme Court of Florida engaged in Ronald Jackson's case is in direct contravention of the decisions of the United States Court of Appeals for the Fifth and Eleventh Circuits holding that the consideration of non-statutory aggravating factors invalidates a Florida death sentence, even absent findings of mitigating factors. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).[2]

Ultimately, the speculative review by the Supreme Court of Florida has eviscerated the state's own limitation on arbitrariness and caprice. Rather than appellate review ensuring consistency and rationality in the death-sentencing process, the "review" in this case has injected the risk of arbitrariness

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2 Indeed, in all prior capital decisions, the Supreme Court of Florida has recognized that, at least where substantial mitigating factors are found, the consideration of non-statutory aggravating factors can never constitute harmless error. Gafford v. State, 387 So.2d 333 (Fla. 1980); Lewis v. State, 377 So.2d 640 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Miller v. State, 373 So.2d 882 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Riley v. State, 366 So.2d 19 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977). In fact, in Barclay v. State of Florida, Case No. 81-6908, the State of Florida conceded this to be the rule of law in Florida in its pleadings filed in this Court requesting that a Writ of Certiorari issue. This Court has subsequently granted review in Barclay, which differs from the case at bar most notably in that no mitigating factors were expressly found to exist in that case.

where none need be. Insurance that the result of the sentence weighing process was not affected by the improper factor in aggravation can only be provided by the sentencing tribunal.

As the Supreme Court of Florida has acknowledged, in explaining its justification for the court's refusal to reweigh and re-evaluate evidence in aggravation or mitigation of sentence:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition."
>
> * * *
>
> Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases.

Brown v. Wainwright, 392 So.2d 1227, 1331-32 (Fla. 1981). It is evident that the Supreme Court of Florida, by speculating on the sentence imposition judgment of the sentencing judge, has far exceeded the proper scope of its appellate review function.

II

THE SUPREME COURT OF FLORIDA, BY APPROVING PETITIONER'S DEATH SENTENCE DESPITE THE SENTENCING COURT'S FAILURE TO ACCORD INDEPENDENT MITIGATING WEIGHT TO SUBSTANTIAL EVIDENCE IN MITIGATION, VIOLATED THE MANDATE OF LOCKETT V. OHIO, 438 U.S. 586 (1978) AND EDDINGS V. OKLAHOMA ____U.S.____, 102 S.CT. 869 (1982).

In Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869 (1982), this Court made clear that the individualized sentencing determination required in a capital case can only be achieved where the sentencing tribunal is free to consider all relevant facts proffered in mitigation. Both decisions underscore that it is not sufficient that the sentencer is congnizant of the evidence in mitigation; it is essential that the sentencing arbiter recognizes that it is entitled to accord independent mitigating weight to that evidence.

At the sentencing hearing in petitioner's case, expert testimony was presented by petitioner regarding his impaired mental state at the time of the offense. Appendix B at 2608-11,

2615-16, 2623-28, 2650-55. Specifically, it was established that petitioner is a borderline mental retardate of "scarcely understanding ability", with lesions in the left hemisphere of his brain which were perhaps the result of inhalation of glue or transmission fluid, that his sister had been murdered on the evening preceding the day of the offense, and that the effect of this loss reduced petitioner to an invalid "incapable of judging", that petitioner was in a "disturbed state" at the time of the offense and "didn't know what he was doing", that petitioner therefore would not have been able to appreciate the nature of his conduct and to conform to the requirements of the law. Appendix B at 2608-10, 2623-24, 2626, 2628, 2650, 2652, 2653-55.

Despite this substantial evidence in mitigation and the fact that the state presented no evidence to contradict the testimony by the experts, the sentencing court found two totally disparate mitigating factors to be applicable to petitioner but completely refused to weigh mental impairment in mitigation. The court explained its failure to weigh petitioner's impairment as follows:

> . . . There was no contention or urging that the defendant was criminally insane but merely that he was unable to conform to the requirements of the law. This Court fails to recognize a voluntary induced condition caused by drug, glue or transmission sniffing as an excuse for the supreme punishment in this heinous case.

Jackson v. State, 366 So.2d 752, 757 (Fla. 1978).

By applying the stringent test of insanity as the gauge for the consideration of evidence of mental dysfunction and by rejecting outright impairment attributable to drug abuse, the sentencing court failed to accord consideration to compelling evidence in mitigation. This undue circumscription of the mitigating factors denied petitioner the reliable and individualized sentencing determination to which he is constitutionally entitled.[3]

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[3] The erroneous application of the insanity standard in assessing mitigating evidence of mental impairment has plagued other death sentencing decisions in Florida. However, in those (Cont.)

The Supreme Court of Florida rejected petitioner's claim in this regard with the following holding:

> It is apparent from the Court's order that the trial judge did in fact consider these mitigating circumstances and further, that he weighed the evidence on this issue and resolved the factual conflicts in favor of the state.

Appendix A at 5.

This holding of the court ignores the fact that there was no conflicting evidence adduced by the state at the sentencing hearing. But more importantly, the holding erroneously presupposes that "consideration" of mitigating evidence in the sentencing order, followed by rejection of that evidence due to the utilization of an improper standard for mitigation, satisfies the Lockett and Eddings mandate. Yet, Lockett and Eddings are clearly to the contrary. The sentencing arbiter must provide independent weight to all relevant mitigation to comply with the Eighth Amendment. Petitioner's sentence, premised upon an erroneously-limited consideration of mitigating evidence, fails to satisfy the holdings of this Court and the requisites of the Eighth Amendment.

III

THE JURY INSTRUCTION PLACING THE BURDEN OF PROOP ON THE CAPITAL DEFENDANT TO SHOW THAT DEATH IS NOT THE APPROPRIATE SENTENCE UPON THE FINDING OF ANY AGGRAVATING CIRCUMSTANCE VIOLATES THE HOLDINGS OF MULLANEY V. WILBUR, 421 U.S. 684 (1975) AND SANDSTROM V. MONTANA, 442 U.S. 510 (1979) AND THE REQUISITES OF THE EIGHTH AMENDMENT.

At the request of the prosecution, and over the objection of counsel for petitioner, the trial court instructed the jury that if it found an aggravating circumstance to exist, "death is presumed to be the proper sentence unless it or they

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cases, Ferguson v. State, 417 So.2d 639 (Fla. 1982), Ferguson v. State, 417 So.2d 631 (Fla. 1982) and Mines v. State, 390 So.2d 332 (Fla. 1980), the Supreme Court of Florida has recognized the impropriety of so constraining the consideration of this type of mitigatory evidence. And the relevance of evidence of impairment attributable to drug abuse in mitigation of sentence has been similarly acknowledged by the state supreme court. See Miller v. State, 373 So.2d 882, 886 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976); Songer v. State, 322 So.2d 481 (Fla. 1975); Gardner v. State, 313 So.2d 675 (Fla. 1975).

are overridden by one or more of the mitigating circumstances provided." Appendix B at 2698. The Supreme Court of Florida held that this instruction did not engender an "improper 'shifting' of the burden of persuasion" at the sentencing hearing because the effect of the instruction was to inform "the jury that should the mitigating circumstances outweigh the presumed fact, they were not bound by the presumption." Appendix A at 5. In essence, the state supreme court has sanctioned a mandatory presumption that death is proper upon proof of one aggravating circumstance on the sole ground that the presumption is not conclusive.

This holding violates the due process principles established in Mullaney v. Wilbur, 421 U.S. 684 (1975). In Mullaney, this Court considered a Maine homicide statute under which, once the prosecution proved intent to kill, the critical element of "malice aforethought" was presumed and the accused deemed guilty of murder, unless he or she proved "by a fair preponderance of the evidence that it was committed in the heat of passion or sudden provocation", thereby reducing the homicide to manslaugher." 421 U.S. at 688, 691-92. Rejecting the argument of the state that the burden of proof was shifted only on the question of punishment as opposed to guilt, rendering due process protections inapplicable, this Court held:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt and innocence for many lesser crimes.

Id. at 698.

Mullaney establishes that an accused cannot be required to bear the burden of persuasion with respect to a fact which must be proved in a criminal prosecution. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Patterson v. New York, 432 U.S. 197

(1977). This principle is particularly applicable to the weighing of aggravating and mitigating circumstances in the capital sentencing process where the Eighth Amendment imposes a greater need for reliability. As this Court has recognized, the overriding of mitigating factors by those in aggravation is an absolute prerequisite to a valid death sentence. Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).[4]

A mandatory presumption that death is the proper sentence, arising solely upon the finding of a single aggravating circumstance, is thus violative of the Due Process Clause and the Eighth Amendment. Regardless of whether Florida law imposes such a burden, see n.4, supra, the instruction in this case unquestionably could, and probably would, have been taken by the jury as placing the burden of proof upon petitioner to overcome the unconstitutional presumption that death was the appropriate sentence. See Sandstrom v. Montana, supra.

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[4] Such was presumably the state of Florida law until the decision in this case. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), the court held that imposition of the death penalty must be limited "to only the most aggravated and unmitigated of most serious crimes." (emphasis supplied). Thereafter, the court ruled that "[n]o defendant can be sentenced to capital punishment unless the aggravating circumstances outweigh the mitigating factors." Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

The instruction in this case is, however, also taken from Dixon, which does state that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." 283 So.2d at 9. Nothing in Dixon suggests that this is other than a standard for appellate review; certainly nothing suggests that this presumption is a proper jury instruction, and it is conspicuously absent from the standard jury instructions promulgated by the state supreme court for use in capital cases.

CONCLUSION

Based upon the foregoing, petitioner requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,

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Supreme Court of Florida

No. 60,271

RONALD JACKSON, Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida, Respondent.

[October 7, 1982]

ADKINS, J.

By petition for writ of habeas corpus, petitioner (hereinafter referred to as defendant) asserts ineffective assistance by counsel on his direct appeal from his conviction and sentence of death, and, that because of this, he is entitled to a belated appellate review. The claim of ineffective assistance of counsel stems from acts or omissions before this Court in Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). We have jurisdiction. Art. V, §3(b)(9), Fla. Const.; Fla. R. App. P. 9.030(a)(3); Knight v. State, 394 So.2d 997 (Fla. 1981).

Defendant has identified four legal errors which he contends his appellate counsel should have raised on direct appeal. He argues that the failure to present those issues denied him his rights to a full and meaningful appeal and to the effective assistance of appellate counsel as guaranteed by the sixth, eighth, and fourteenth amendments to the Constitution of the United States. These asserted legal errors include: 1) the trial court's admission of oral statements made by defendant

Appendix A

during interrogation proceedings conducted after invocation of his Miranda rights; 2) the trial court's application of a nonstatutory aggravating circumstance, i.e., defendant's failure to display remorse for the offense; 3) the trial court's improper construction of mitigating circumstances, i.e., impaired mental state of defendant at the time of the offense and his inability to conform his conduct to the requirements of law; and, 4) the trial court's instructions to the jury that where one or more of the aggravating circumstances is found death is presumed to be the proper sentence, unless they are overridden by one or more of the mitigating factors. We have considered these assertions in light of the standards announced in Knight and find no substantial deficiency in defendant's representation on appeal by which he was prejudiced.

Defendant was first arrested by a Florida highway patrol officer and was immediately advised of his Miranda rights. Defendant invoked his right to remain silent, and interrogation ceased. Defendant was then turned over to Dade County officers and placed in the Dade County jail. Approximately four hours after defendant had invoked his privilege of remaining silent, Dade County officers gave defendant a fresh set of warnings. Defendant says his counsel should have challenged the admissibility of oral statements made by him during interrogations conducted after defendant's assertion of his fifth amendment right of silence. Instead, defendant says his counsel challenged the admissibility of the statements on other grounds, overlooking the merits of this claim which certainly had an "arguable chance of succeeding." We disagree.

In Jennings v. United States, 391 F.2d 512 (5th Cir.), cert. denied, 393 U.S. 868 (1968), it appeared that Jennings was first warned by Ft. Pierce, Florida, police of his Miranda rights. After Jennings answered a few questions he announced that he would not answer any further questions and the interrogation immediately stopped. Approximately one hour later, an agent of the Federal Bureau of Investigation arrived at the police station

to interrogate Jennings. Proceeding as if there had been no prior interrogation, the FBI agent again gave full and complete warning. Subsequent to these warnings, the defendant signed a waiver and did not hesitate to discuss the matter with the agent. Jennings challenged the admissibility of the statements arguing that he had refused to answer any further questions from Fort Pierce police and it was improper, under Miranda, for the FBI agent to question him. The Court held that there was no error in the admission of the statement obtained by the FBI. It cannot be said that a challenge to the admissibility of the statement on this ground would have an "arguable chance of success," as to warrant the conclusion that defendant was prejudiced by his counsel's failure to review this argument on appeal, or that defendant's counsel provided ineffective assistance in failing to reargue this point.

Defendant argues that in the findings of fact supporting the sentence of death, the trial judge expressly relied upon, in addition to two statutory aggravating and two statutory mitigating factors, one nonstatutory aggravating factor, i.e., defendant's failure to display remorse for the offense.

The first paragraph of these findings of fact reads as follows:

> That sufficient aggravating circumstances exist in this particular case that far outweigh any mitigating circumstances in the record. The death of this decedent occurred while the defendant was engaged in the commission of the crime of Armed Robbery. In addition thereto the defendant clearly committed the capital felony in order to eliminate the victim of the robbery. He forcibly transported the victim against her will, from the scene of the robbery to a lonely desolate area to accomplish the capital felony. These facts alone, in this Court's judgment could justify the imposition of the death penalty, but this particular killing is far more despicable and heinous than this.

366 So.2d at 756 (emphasis added).

In the Court's reasoned judgment, these facts alone were sufficient to warrant the imposition of the death penalty. However, the Court also discussed the heinous nature of the crime, and then said:

> The facts of this case are the most "heinous, atrocious and cruel" that this Court has ever considered. It is for crimes like the one at bar that the death penalty is in fact appropriate. See Sullivan v. State, 303 So.2d 632 (Fla.1974).

366 So.2d at 756.

In giving the reasons for the death sentence in this case, the trial judge was assuring himself that he was reaching a similar result to that reached under similar circumstances in another case. This reasoning process is exemplified by the cite to Sullivan. It was after this that the Court said:

> This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed any sign of remorse, indicating full well to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case.

366 So.2d at 756-57.

This was error. However, the defendant has the burden to show that this specific deficiency when considered under the circumstances of the individual case was substantial enough to demonstrate a prejudice to him to the extent that there is a likelihood that the deficient conduct affected the outcome of the proceedings. This means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. Knight v. State.

Although an improper aggravating circumstance (lack of remorse) was included in the findings of the trial judge's sentence decision and there were identified two mitigating circumstances (defendant's age and first conviction), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977), would not compel reversal of the sentence judgment in this case. It is apparent on the face of the findings by the trial judge that the result of the weighing process would not have been different had the impermissible factor not been present. Jackson, 366 So.2d at 756. It is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance. Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118 (1981). There was no substantial deficiency by appellate

counsel and no prejudice stemming from the failure to raise this issue.

Defendant also says that appellate counsel should have questioned on appeal the trial court's failure to consider the impaired mental state of defendant at the time of the offense and his inability to conform his conduct to the requirements of law. It is apparent from the court's order that the trial judge did in fact consider these mitigating circumstances and further, that he weighed the evidence on this issue and resolved the factual conflicts in favor of the state. The record does not support defendant's contention, so the failure of appellate counsel to raise this issue is not an omission that was a serious deficiency. There was no prejudice shown.

The instruction at the sentencing hearing was in conformity with the law as stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The death penalty is appropriate where there exists evidence of one or more aggravating circumstances proved by the state beyond a reasonable doubt. Mitigating circumstances are not offered as rebuttal evidence of aggravating circumstances. Mitigating circumstances, if any, are offered by the defendant to show that the "totality of the circumstances" warrants less than the death penalty. There is no improper "shifting" of the burden of persuasion with respect to a fact which must be proved during the sentencing procedure.

The trial court's instruction, when considered in its entirety, was a proper admonishment to the jury that they were not to add up the aggravating and mitigating factors in a mechanistic and wooden fashion, but were to weigh the "totality of the circumstances" in arriving at a reasoned judgment as to whether the facts warranted imposition of the death penalty or life imprisonment. The court instructed the jury that should mitigating circumstances outweigh the presumed fact, they were not bound by the presumption.

The instruction of the trial court was not improper, so the failure of counsel to challenge the instruction on direct appeal did not deprive defendant of effective assistance of appellate counsel.

Having now carefully considered the alleged ineffectiveness of appellate representation, we find no serious deficiencies causing prejudices to defendant. The petition for writ of habeas corpus is denied.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Habeas Corpus

Bennett H. Brummer, Public Defender; and Karen M. Gottlieb and Elliot H. Scherker, Assistant Public Defenders, Eleventh Judicial Circuit, Miami, Florida,

for Petitioner

Jim Smith, Attorney General and Theda R. James, Assistant Attorney General, Miami, Florida,

for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

RONALD JACKSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Ronald Jackson, by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Petitioner has been adjudicated indigent and permitted to proceed in forma pauperis by the courts of the State of Florida. The affidavit of the petitioner in support of this motion is attached hereto.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

RONALD JACKSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, RONALD JACKSON, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I am not presently employed and have not been employed for three years preceding the execution of this affidavit.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources. I do not own any cash or checking or savings account.

I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ronald Jackson
RONALD JACKSON

Sworn to and subscribed before me
this 18 day of November, 1982.

J W Warren
NOTARY PUBLIC
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

CASE NO. 82-5935

UNITED STATES SUPREME COURT

October Term, 1982

RONALD JACKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

==========

ON APPEAL FROM THE SUPREME COURT OF FLORIDA
RESPONSE TO PETITION FOR WRIT OF CERTIORARI

==========

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

401 N.W. 2nd AVENUE, SUITE 820
MIAMI, FLORIDA 33128
(305) 377-5441

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I

THE FLORIDA SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S STATE PETITION FOR WRIT OF HABEAS CORPUS WHEREIN PETITIONER ASSERTED COUNSEL'S FAILURE TO RAISE AND ARGUE SPECIFIC ISSUES RESULTED IN PETITIONER BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A.

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-STATUTORY AGGRAVATING FACTOR IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS CONTRARY TO CONSTITUTIONAL PRINCIPLES DEMANDED IN STATE APPELLATE REVIEW IN CAPITAL CASES.

B.

WHETHER THE FLORIDA SUPREME COURT'S DENIAL OF PETITIONER'S HABEAS CORPUS PETITION DID CONDONE A VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) AND EDDINGS v. OKLAHOMA, __U.S.__ 102 S.Ct. 869 (1982).

C.

WHETHER THE JURY INSTRUCTION PLACING THE BURDEN OF PROOF ON THE CAPITAL DEFENDANT TO SHOW DEATH IS AN APPROPRIATE SENTENCE VIOLATES MULLONEY v. WILBUR, 421 U.S. 684 (1975) AND SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

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TABLE OF CITATIONS

IN THE

UNITED STATES SUPREME COURT

October Term, 1982

Case No.

==========

RONALD JACKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

==========

PRELIMINARY STATEMENT

Respondents accept the portion of the Petition for Writ of Certiorari setting forth the citation to the inion Below, Constitutional Provisions and Statutes I. olved and Statements of the Case found on pages 1-5 of the Petition. With regard to the Question Presented and Jurisdiction, Respondents have rephrased the Question Presented and would contend Petitioner has failed to demonstrate grounds warranting this Court's jurisdiction.

REASONS FOR NOT GRANTING THE WRIT

Petitioner raises three grounds upon which he asserts relief should be granted. Respondents submit that each ground is not properly before the Court in that Petitioner's

state petition for writ of habeas corpus presented to the Florida Supreme Court challenged the competency of counsel for failing to raise the three issues presented herein. The Florida Supreme Court in reviewing each claim in light of whether Petitioner's counsel was competent, concluded that Petitioner's counsel did not fall below the Knight v. State, 394 So.2d 997 (Fla. 1981) standard and held that "no substantial deficiency" occurred on appeal "by which he was prejudicied." (P.Appendix A-p2.)

Moreover, Petitioner seek to have reviewed the merits of each claim albeit this Court in Jackson v. State, 444 U.S. 885 (1979) denied certiorari on the same issues when Petitioner sought review following the affirmance of his direct appeal by the Florida Supreme Court in Jackson v. State, So.2d 752 (Fla. 1978). Petitioner is attempting to obtain a second bite of this Court's apple.

THE FLORIDA SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S STATE PETITION FOR WRIT OF HABEAS CORPUS WHEREIN PETITIONER ASSERTED COUNSEL'S FAILURE TO RAISE AND ARGUE SPECIFIC ISSUES RESULTED IN PETITIONER BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. THE DECISION OF THE FLORIDA SUPREME COURT UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-STATUTORY AGGRAVATING FACTOR IS NOT IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS CONTRARY TO CONSTITUTIONAL PRINCIPLES DEMANDED IN STATE APPELLATE REVIEW IN CAPITAL CASES.

Petitioner has refashioned the issues by now contending that the Florida Supreme Court's decision denying state habeas corpus relief directly conflicts with Zant v. Stephens, cert granted, __U.S.__, 102 S.Ct. 90 (1981) certified to Georgia Supreme Court __U.S.__, 102 S.Ct. 1856 (1982) and Henry v. Wainwright, 686 F.2d 311

(5th Cir. 1982) cert pending; Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) cert pending.

In denying Petitioner habeas corpus relief, the Court reviewed the alleged omissions in terms of whether said omissions resulted in a denial of effective assistance of counsel. The Court observed:

> "In giving the reasons for the death sentence in this case, the trial judge was assuring himself that he was reaching a similar result to that reached under similar circumstances in another case. This reasoning process is exemplified by the cite to Sullivan. It was after this that the Court said:
>
> > This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed any sign of remorse, indicating full well to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case. 366 So.2d at 756-757.
>
> This was error. However, the defendant has the burden to show that this specific deficiency when considered under the circumstances of the individual case was substantial enough to demonstrate a prejudice to him to the extent that there is a likelihood that the deficient conduct affected the outcome of the proceedings. This means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. Knight v. State." P. Appendix A - p.4

The Court after reviewing the nature of the issue involved held:

> "It is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance. Brown v. State, 381 So.2d 690 (Fla. 1980), cert den. 449 U.S. 1118 (1981). There was no substantial deficiency by appellate counsel and no prejudice stemming from the failure to raise this issue." P. Appendix A - p.4-5.

This Court in Jackson v. State, supra, denied certiorari in 1979 on the theory that use of a non-statutory aggravating circumstance did not present a

compelling issue. Similarly in Brown v. State, 381 So.2d 690 (Fla. 1980) this Court again in reviewing a similar claim denied certiorari. Recently, the State of Florida agreed in Barclay v. Florida, Case No. 81-6908 that a federal question was raised therein concerning whether the use of a non-statutory aggravating circumstance required vacation of the death sentence and a new sentencing hearing.

Respondents would submit that sub judice Petitioner is attempting to gain review by back-dooring an alleged Barclay issue, when in fact the Florida Supreme Court found in Jackson v. Wainwright, __So.2d__ (Fla. 1982) Case No. 60,271 decided October 13, 1982, that error occurred but that counsel's representation and his failure or omission to raise this claim did not result in ineffective assistance of counsel

The authorities Petitioner argues conflict with the Florida Supreme Court's decision are either distinguishable or non-final decisions pending review before this Court. More importantly a review of the decision in Jackson v. Wainwright, supra, reveals that the Court did not reach its result that said error denied Petitioner competent counsel on speculation, but rather reasoned judgment based on its function as announced in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) to determine whether the evidence supports the trial court's imposition of death and to insure procedural regularity in the application of Florida's death penalty.

B. THE FLORIDA SUPREME COURT'S DENIAL OF PETITIONER'S HABEAS CORPUS PETITION DID NOT CONDONE A VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) AND EDDINGS v. OKLAHOMA, __U.S.__ 102 S.Ct. 869 (1982).

The Florida Supreme Court concluded that Petitioner's counsel did not render ineffective assistance

in not raising this claim on direct appeal. Specifically the Court observed:

> "It is apparent from the Court's order that the trial judge did in fact consider these mitigating circumstances and further, that he weighed the evidence on this issue and resolved the factual conflicts in favor of the state. The record does not support defendant's contention, so the failure of appellate counsel to raise this issue is not an omission that was a serious deficiency. There was no prejudice shown." P. Appendix A - p.5.

Where, as here, the trial court in considering the tendered evidence of "mitigation" gave said evidence little or no weight, no Lockett v. Ohio, 438 U.S. 586 (1970) has occurred. This same issue was rejected by this Court in denying certiorari review in Jackson v. State, supra. Moreover, the Florida Supreme Court has held in a number of decisions similar to Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) that the Supreme Court will not substitute its judgment for that of the trier of fact and thus concluded that resolution of conflicting evidence on mental condidtion "lies within the province of the trier of fact" whose duty it is to "weigh the evidence presented."

C. THAT THE JURY INSTRUCTION PLACING THE BURDEN OF PROOF ON THE CAPITAL DEFENDANT TO SHOW DEATH IS NOT AN APPROPRIATE SENTENCE VIOLATES MULLONEY v. WILBUR, 421 U.S. 684 (1975) AND SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

The claim asserted challenges the propriety of the trial court's instruction to the jury that if the jury found statutory aggravating factors to exist, "death is presumed to be the proper sentence unless it or they are overridden by on or more of the mitigating circumstances provided."

The Florida Supreme Court in concluding appellate counsel was not ineffective for failing to raise said claim concluded that the instruction was not improper and therefore counsel did not render ineffective assistance.

A similar claim has been rejected by a number of federal district courts reviewing capital cases that there has not been an impermissible shift of burden.

In Dixon v. State, 283 So.2d 1 (Fla. 1973) cert den. 416 U.S. 943 (1974), the Court held that while all evidence of mitigation may be considered, aggravating circumstances must be proved beyond a reasonable doubt before being considered by the jury or judge. In Florida, the death penalty is appropriate only where there exist evidence of one or more aggravating circumstances beyond a reasonable doubt. Mitigating cricumstances are not presented as rebuttal but rather in an effort to show whether the totality of the circumstances warrants less than the death penalty. Clearly there is no improper shifting of burden.

Neither does a mere counting of aggravating and mitigating circumstances occur. Rather reasoned judgment must be construed as an admonishment to the jury that they are not to add up the aggravating and mitigating circumstances but rather they are to weigh the totality of circumstances in reaching a reasoned judgment.

Petitioner has failed to satisfactorily demonstrate that the Florida Supreme Court in viewing whether appellate counsel was competent misapplied the law or incorrectly concluded that said omissions were error of such proportion that prejudice resulted and Petitioner's sentence of death was flawed.

CONCLUSION

Based on the foregoing, Respondents would urge this Court to deny exercising its jurisdiction.

Respectfully submitted,

JIM SMITH
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BY _____
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to KAREN M. GOTTLIEB, BENNETT H. BRUMMER, and ELLIOT H. SCHERKER, Public Defender's Office, 1351 N.W. 12th Street, Miami, Florida 33125, this 14th day of March, 1983.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

bc/